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United States Court of Appeals
Tenth Circuit

September 18, 2023

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

LARRY COATES,

Defendant - Appellant.

No. 22-3122

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 6:21-CR-10037-EFM-1)

Paige A. Nichols, Assistant Federal Public Defender (Melody Bannon, Federal Public Defender, with her on the briefs), Office of the Federal Public Defender, Topeka, Kansas, for Defendant – Appellant.

Sonja M. Ralston, Attorney, Appellate Section (Duston Slinkard, United State Attorney; James Brown, Assistant United States Attorney, Appellate Chief, D. Kansas; Kenneth A. Polite, Jr., Assistant Attorney General; Lisa H. Miller, Deputy Assistant Attorney General, with her on the brief), Criminal Division, United States Department of Justice, Washington, D.C., for Plaintiff – Appellee.

Before **MORITZ**, **BALDOCK**, and **MURPHY**, Circuit Judges.

MURPHY, Circuit Judge.

I. Introduction

In 2019, Larry Coates was caught in possession of child pornography. At that time, he was serving supervised release for Kansas-state child exploitation violations. Coates pleaded guilty to a single count of violating 18 U.S.C. § 2252A(a)(5)(B), (b)(2). In anticipation of sentencing, the probation office prepared a presentence investigative report ("PSR"). The PSR recommended a pattern of activity enhancement pursuant to U.S.S.G. § 2G2.2(b)(5). Although § 2G2.2(b)(5) does not define what qualifies as a "pattern," corresponding commentary states a pattern may arise from offenses unrelated to the underlying crime. Coates objected to the enhancement, reasoning it could only apply if the commentary's definition of pattern was used. In doing so, Coates advocated the district court rely on the Supreme Court's recent decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019), which determined courts can only defer to commentary accompanying executive agency regulations when the associated regulation is "genuinely ambiguous." Absent express guidance from this court, the district court declined to apply *Kisor* and it did not otherwise believe the commentary inconsistent with the guideline. This court recently confirmed this approach in *United States v. Maloid*, 71 F.4th 795 (10th Cir. 2023). There, we held *Kisor* does not apply to the Sentencing Commission, and therefore, its commentary should be relied upon unless "plainly erroneous or inconsistent" with the guidelines. *Id*. at 805–06 (citing *Stinson v. United States*, 508 U.S. 36, 47 (1993)). We conclude § 2G2.2's commentary presents no such inconsistency, and thus,

exercising our jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, **affirm** the district court's sentencing decision.

II. Background

Between February 1, 2001, and May 21, 2002, Coates sexually abused his niece, a minor, on multiple occasions. Coates forced her to perform sexual acts, and on at least two occasions he took photos of this exploitation. Following investigation, Coates pleaded guilty in state court to three counts of aggravated indecent liberties and three counts of sexual exploitation of a child. He received a sentence of 184 months' imprisonment, followed by thirty-six months' post-release supervision.

In February 2019, while still on parole, Coates was the subject of a second investigation. This time, the National Center for Missing and Exploited Children tipped the Wichita Police Department that someone at Coates's address had repeatedly uploaded child pornography online and attempted several reverse-image searches to find similar photographs. Upon obtaining a search warrant for his electronic devices, authorities discovered hundreds of images and videos of child pornography. On May 19, 2021, a federal grand jury indicted Coates for one count of child pornography possession in violation of 18 U.S.C. § 2252(A)(a)(5)(B) and (b)(2), to which he pleaded guilty.

The probation office prepared a PSR containing several offense level enhancements, including one for pattern of activity pursuant to U.S.S.G. § 2G2.2(b)(5). The enhancement was applied based on Coates's previous child exploitation crimes from 2001 and 2002. The guideline, which falls under the

heading, "specific offense characteristics," provides: "[i]f the defendant engaged in a pattern of activity involving the sexual abuse or exploitation of a minor, increase by 5 levels." U.S.S.G. § 2G2.2(b)(5). The commentary to the guideline defines "pattern of activity" as "any combination of two or more separate instances of the sexual abuse or sexual exploitation of a minor by the defendant, *whether or not* the abuse or exploitation (A) occurred during the course of the offense; (B) involved the same minor; or (C) resulted in a conviction for such conduct." *Id.* § 2G2.2 cmt. n.1 (emphasis added).

Coates objected to the application of the pattern enhancement. He reasoned the text of U.S.S.G. §§ 2G2.2(b)(5) and 1B1.3(a)(1)(A) unambiguously show a pattern of activity can only be based on conduct related to the underlying offense. He argued the commentary to § 2G2.2, therefore, plainly conflicts with the sentencing guidelines by allowing pattern enhancements based on prior conduct. In turn, Coates urged this court to apply the Supreme Court's decision in *Kisor*, which only permits reliance on executive agency commentary where "genuine ambiguity" in the regulation exists. 139 S. Ct. at 2414. The district court overruled Coates's objection, explaining that without further direction as to whether *Kisor* applies to the sentencing guidelines, it would continue to generally defer to Commission commentary. Similarly, the district court could not identify a fundamental inconsistency between the guidelines and the § 2G2.2 commentary that would upset this deference. Applying the enhancement, Coates was sentenced to 180 months' imprisonment, followed by ten years of supervised release.

III. Analysis

"When evaluating sentence enhancements under the Sentencing Guidelines, this court reviews the district court's factual findings for clear error and questions of law de novo." *United States v. McDonald*, 43 F.4th 1090, 1095 (10th Cir. 2022).

a. *Kisor* Application

In *Stinson*, the Supreme Court analyzed to what degree sentencing guidelines commentary can be relied upon for sentencing decisions. 508 U.S. at 42. The Court concluded, "provided an agency's interpretation of its own regulations does not violate the Constitution or a federal statute, it must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" *Id*. at 45 (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). This interpretation of commentary's effect was derived from well-established notions of agency deference that prioritize the expertise of rule-making bodies. *Id*.; *Kisor*, 139 S. Ct. at 2412. Since *Stinson*, this court has regularly applied broad deference to the Commission's commentary where no inconsistency is otherwise present. *See, e.g.*, *United States v. Babcock*, 40 F.4th 1172, 1184 (10th Cir. 2022); *United States v. Martinez*, 602 F.3d 1166, 1173–74 (10th Cir. 2010); *United States v. Morris*, 562 F.3d 1131, 1135 (10th Cir. 2009).

In *Kisor*, the Supreme Court adapted these principles of deference as applied to executive agencies. 139 S. Ct. at 2414–15. There, the Court determined, "[f]irst and foremost, a court should not afford . . . deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for

deference." *Id*. at 2415 (citation omitted). The Court added, "before concluding that a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction." *Id*. (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, n.9 (1984)). The Court's renewed interpretation of deference, however, did not discuss either the sentencing guidelines or *Stinson*. *Maloid*, 71 F.4th at 804. Without clear direction as to whether *Kisor*'s stricter concept of deference applies to the Sentencing Commission, circuit courts are split as to how to treat sentencing commentary. *See, e.g.*, *United States v. Vargas*, 74 F.4th 673, 679 (5th Cir. 2023); *United States v. Castillo*, 69 F.4th 648, 657–58 (9th Cir. 2023); *United States v. Nasir*, 17 F.4th 459, 470–71 (3d Cir. 2021) (en banc); *United States v. Dupree*, 57 F.4th 1269, 1275 (11th Cir. 2023) (en banc); *United States v. Riccardi*, 989 F.3d 476, 484–85 (6th Cir. 2021); *United States v. Lewis*, 963 F.3d 16, 24–25 (1st Cir. 2020).

Quite recently, our court weighed-in on the issue. In *Maloid*, we concluded, "if the Supreme Court meant *Kisor* to reach sentencing, it would have said so." 71 F.4th at 809. We determined *Kisor*'s concept of deference applied especially to executive agencies and *Stinson* continued to govern sentencing commentary. *Id*. at 806–08. As applied, *Maloid* decided the district court did not err in deferring to § 2K2.1 and § 4B1.2 commentary because it did not conflict with the underlying rules. *Id*. at 813. Contrary to both parties' arguments in this case, therefore, *Kisor* does not apply to sentencing guideline commentary and the *Stinson* standard controls. *Id*. at 805. This conclusion forecloses much of Coates's argument, including his contention that the

guidelines are not ambiguous, and thus the more expansive definition of pattern included in the § 2G2.2 commentary cannot be relied upon under *Kisor*.[1]

b. *Stinson* Analysis

Coates's remaining arguments posit the § 2G2.2 commentary is inconsistent with the guidelines, and therefore inapplicable under *Stinson*. He identifies two potential conflicts: first, § 2G2.2(b)(5) is classified as a "specific offense characteristic," and cannot be interpreted to include conduct not specific to the underlying offense; and second, § 1B1.3(a), which governs what is classified as relevant conduct for calculating sentencing ranges, disallows the broader definition of "pattern" included in the § 2G2.2 commentary. This court concludes neither guideline renders the § 2G2.2 commentary plainly erroneous or inconsistent.

Although we have yet to scrutinize the § 2G2.2 pattern enhancement under *Stinson*, this court has helpfully interpreted the guideline in other contexts. In *United States v. Groves*, we described the commentary's definition of pattern as "at least a fair interpretation of [§ 2G2.2(b)(5)]" pursuant to ex post facto clause analysis. 369 F.3d 1178, 1184 (10th Cir. 2004). While considering procedural reasonableness in *United States v. Lucero*, this court also determined the commentary to § 2G2.2

[1] Coates also argues the rule of lenity should be used as a "traditional tool[] of construction" prior to making a determination that a guideline is genuinely ambiguous under *Kisor*. 139 S. Ct. at 2414–15. This argument is similarly foreclosed by *Maloid* because exhaustion of traditional tools of construction is not required prior to deferring to the commentary under *Stinson*. 71 F.4th at 809; *see also infra* n.3. The same is true for Coates's contention that the § 2G2.2 commentary cannot be relied upon because it does not "implicate [the agency's] substantive expertise." *Kisor*, 139 S. Ct. at 2417. This expertise-based standard is not applicable under *Stinson*.

"makes clear that the pattern of activity need not be contextually related to the offense for which the defendant is being sentenced." 747 F.3d 1242, 1248 (10th Cir. 2014). These statements demonstrate a history of harmonizing § 2G2.2 commentary with the text of the guidelines despite the use of the "specific offense characteristic" heading and presence of § 1B1.3(a).

Several other guidelines and their application notes reinforce that it is a "fair interpretation" to conclude pattern enhancements as incorporating conduct not contemporaneous to the underlying offense. In addition to § 2G2.2, "specific offense characteristics" included in three other guidelines allow recidivism to increase a defendant's offense level. *See* U.S.S.G. § 2A6.2 cmt. n.1 ("Pattern of activity involving stalking . . . the same victim, whether or not such conduct resulted in a conviction"); *Id.* § 2B1.6 cmt. n.6 ("pattern of misconduct involving cultural heritage resources . . . that did not occur during the course of the offense"); *Id.* § 2S1.3 cmt. n.3 ("pattern of unlawful activity . . . without regard to whether any such occasion occurred during the course of the offense"). Given the frequency of this construction, it is reasonable to conclude these guidelines specifically identify recidivist behavior that especially heightens the severity of certain crimes. Contrary to Coates's argument, therefore, patterns incorporating separate, prior conduct can be offense-specific when the guidelines expressly make recidivism relevant. In turn, the

inclusion of § 2G2.2(b)(5) under the heading "specific offense characteristic" does not categorically render it irreconcilable with the guidelines under *Stinson*.[2]

Coates's argument that the § 2G2.2 commentary presents inconsistency with § 1B1.3(a) similarly fails. Section 1B1.3 states that "specific offense characteristics . . . shall be determined on the basis of . . . all acts willfully caused by the defendant . . . that occurred during the commission of the offense." The guideline creates a presumption that only conduct related to the underlying offense will be used in evaluating specific offense characteristics like § 2G2.2(b)(5)'s pattern enhancement. *United States v. Holbert*, 285 F.3d 1257, 1260 (10th Cir. 2002). We note, however, that § 1B1.3(a) includes an important qualifier. It states that such relevant conduct shall be used "[u]nless otherwise specified." Here, the commentary clearly expresses otherwise. As the Commission noted when it expanded the commentary, "the conduct considered for purposes of the 'pattern of activity' enhancement is broader than the scope of relevant conduct typically considered under § 1B1.3." U.S. Sentencing Comm'n, Amendment 537, Reason for Amendment. Other circuits agree with this conclusion. *See, e.g.*, *United States v. McGarity*, 669 F.3d 1218, 1259 (11th Cir. 2012) (finding "no difficulty in reconciling" § 2G2.2 application note 1 and

[2] The same conclusion applies to Coates's argument that recidivism can only be considered in chapter four of the guidelines while calculating criminal history. A crime prone to repeat offense, like child exploitation, may be specifically enhanced by the act of recidivism itself. *See* U.S. Sentencing Comm'n, *The History of Child Pornography Guidelines* 30 (2009) ("The Commission's research demonstrated that those offenders who had a prior history of abusing children should receive lengthier sentences due to a propensity to recidivate.").

§ 1B1.3(a)); *United States v. Williamson*, 439 F.3d 1125, 1140 (9th Cir. 2006) (noting the court was "satisfied that U.S.S.G. § 2G2.2(b)[(5)] falls under the category of 'unless otherwise specified'"); *United States v. Ashley*, 342 F.3d 850, 852 (8th Cir. 2003) (holding § 2G2.2 is broader than the scope of conduct considered by § 1B1.3); *United States v. Lovaas*, 241 F.3d 900, 904 (7th Cir. 2001) (concluding the "phrase 'unless otherwise specified' . . . permits courts to consider additional conduct" as described by § 2G2.2's commentary). We adopt this same reasoning in concluding § 1B1.3(a) is consistent with application note 1 to § 2G2.2.

Coates argues only a guideline, not commentary, can create an exception under § 1B1.3(a). To support this contention, he points to § 1B1.3(a)(4), which states specific offense characteristics can be determined on the basis of "any other information specified in the applicable *guideline*" (emphasis added). The absence of commentary from this phrase, Coates posits, demonstrates an application note cannot introduce previous, non-contemporaneous conduct alone. This interpretation, however, does not align with our precedent. We have previously deferred to commentary to clarify whether § 1B1.3 applies. *See United States v. Zarate-Suarez*, 970 F.3d 1330, 1337 (10th Cir. 2020); *United States v. Pena-Sarabia*, 297 F.3d 983, 987–88 (10th Cir. 2002). The commentary in § 2G2.2 is the type of "more explicit instructions in the context of the specific guideline" contemplated by the Commission when it expanded the pattern enhancement by amendment. U.S.S.G. § 1B1.3 cmt. background. The commentary, thus, functions to "interpret the guideline or explain how it is to be applied." *Id.* § 1B1.7. Given this context, we do not perceive any

inconsistency just because commentary is not explicitly referred to in § 1B1.3(a)(4). *United States v. Jones*, 15 F.4th 1288, 1291 (10th Cir. 2021) ("When interpreting the Guidelines, we must determine the intent of the Sentencing Commission." (quotation omitted)).[3] As we have previously concluded under *Stinson*, the commentary is authoritative and should be relied upon unless plainly erroneous or inconsistent with the Constitution, federal statute, or the guidelines. *Babcock*, 40 F.4th at 1184. A thorough review of the guidelines and our precedent reveals no such inconsistency here.

IV. Conclusion

The sentence entered by the United States District Court for the District of Kansas is hereby **affirmed**.

[3] Coates argues that at the very least, there is ambiguity in the guideline, and therefore the rule of lenity should apply. As previously discussed, no such ambiguity exists because the *Stinson* standard allows us to rely on the commentary which expressly instructs how to apply the rule. *United States v. Randall*, 472 F.3d 763, 766–67 (10th Cir. 2006) (the rule of lenity only applies to sentencing guidelines "where there is a grievous ambiguity or uncertainty in the language and structure of a provision").